

STATE OF MICHIGAN
COURT OF APPEALS

E. DONALD NELSON and VIRGINIA A. D.
NELSON,

UNPUBLISHED
February 12, 1999

Plaintiffs-Appellants,

v

No. 206302
Emmet Circuit Court
LC No. 96-003837 NM

WAYNE RICHARD SMITH and SMITH &
ERHART, P.C.,

Defendants-Appellees.

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiffs E. Donald Nelson and Virginia A. Nelson appeal as of right from an order granting summary disposition to defendants Wayne R. Smith and Smith & Erhart, P.C. pursuant to MCR 2.116(C)(8). We affirm.

Plaintiffs filed this legal malpractice action against their lawyers in connection with defendants' representation of plaintiffs when a bank initiated and completed a foreclosure by advertisement against plaintiffs' home.

Plaintiffs first contend that the lower court erred in granting summary disposition to defendants because the complaint sufficiently alleged that defendants committed malpractice by failing to file an action for a minimum bid price under MCL 600.3155; MSA 27A.3155. Foreclosure by advertisement is governed by MCL 600.3201 *et seq.*; MSA 27A.3201 *et seq.* ("Chapter 32"), while foreclosure by judicial action is governed by MCL 600.3101 *et seq.*; MSA 27A.3101 *et seq.* ("Chapter 31"). "Foreclosure by advertisement is controlled by statute. A mortgagee who uses this method of foreclosure must follow the statutory requirements Also, foreclosure by advertisement is not a judicial action and does not involved state action . . . but rather is based on a contract between the mortgagor and the mortgagee." *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 539 (1994). MCL 600.3155; MSA 27A.3155, found in Chapter 31, reads as follows:

In any forfeiture, foreclosure, or specific performance case based upon a mortgage on real estate or land contract the court may fix and determine the minimum price at which the real property covered by the mortgage or land contract may be sold at the sale under the forfeiture, foreclosure, or specific performance proceedings. [*Id.*]

Section 3155, by its plain and unambiguous language, applies to “any . . . case” involving forfeiture, foreclosure, or specific performance. Because foreclosure by advertisement is not a judicial action and is therefore not a “case” under the plain meaning of the word, *Cheff, supra*, 203 Mich App at 560, section 3155 did not apply to plaintiffs’ action. Accordingly, defendants were not negligent for failing to advise plaintiffs to file an action for a minimum bid price.

Plaintiffs also contend that, disregarding MCL 600.3155; MSA 27A.3155, they pleaded facts sufficient to withstand a motion for summary disposition under MCR 2.116(C)(8) when they alleged that defendants failed to file an injunction to prevent the foreclosure, failed to advise their clients to hold over, failed to move to set aside the sale or have it adjudicated invalid, and failed to counsel their clients regarding their rights and remedies under the foreclosure by advertisement procedure. We disagree. Plaintiffs pleaded no facts to support the allegation that defendants should have requested an injunction to stop the foreclosure action nor facts that would support any of the other matters alleged. Plaintiffs simply failed to allege facts that the foreclosure by the bank was faulty such that an injunction should or would arguably have been granted or such that the foreclosure should arguably have been deemed invalid. An essential element of a legal malpractice claim is that the attorney’s action or inaction adversely affected the outcome of the case. See *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). Because plaintiffs failed to show that defendants’ inaction likely affected the outcome of the foreclosure proceedings – i.e., because plaintiffs failed to show that the foreclosure itself was faulty or was likely faulty such that it could have been invalidated upon request by defendants – they did not state a prima facie case of legal malpractice.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Hilda R. Gage